United States Gypsum Company *and* United Paperworkers International Union, AFL-CIO, CLC.
Cases 5-CA-12049 and 5-CA-12517

January 20, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 25, 1981, Administrative Law Judge Arthur Leff issued the attached Decision in this proceeding. Thereafter, the General Counsel, the Charging Party, and Respondent filed exceptions and supporting briefs. The General Counsel and Respondent also filed answering briefs to each other's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We agree with the Administrative Law Judge's findings, conclusions, and remedy in connection with his finding that Respondent violated Section 8(a)(5) and (1) of the Act by refusing since March 18, 1980, to meet and bargain with the Union as the exclusive bargaining representative of its employees in the appropriate unit. Our discussion below is, therefore, limited to the allegation dismissed by the Administrative Law Judge that Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily terminating the employment of James E. Carter on or about August 8, 1980, because of his membership in and activities on behalf of the Union.

As more fully described by the Administrative Law Judge, the credited record evidence surrounding the incident that led to Carter's discharge is as follows: On Thursday, July 31, plant engineer Lammeree told Carter that a part needed to repair forklift truck 16 would arrive at Respondent's plant at or about 2:30 or 3 p.m. on Friday, August 1, and that Carter should expect to stay on to install it even if it meant working overtime. On August 1, Carter worked all day without taking a break repairing the engine on forklift truck 4 and by 3 p.m., his normal quitting time, had successfully completed that job. After showing Lammeree the work he had done on forklift truck 4, Carter left the shop to punch out shortly after 3 p.m.

About the same time, Sam Bianco, who had been sent to another city to pick up the electric harness needed to repair forklift truck 16, returned to the shop. Lammeree approached Carter and told him that the part had arrived and that he wanted Carter to install it. Carter told Lammeree that he had already done a full day's work, that he had an appointment to keep, that Lammeree had another mechanic there who could do the job, and that he should have the other mechanic install the electric harness. Lammeree attempted to accommodate Carter by asking Bianco to install the harness. Bianco said that he doubted that he could perform the work. Lammeree related his conversation with Bianco to Carter and instructed Carter to remain overtime and perform the work. Carter again told Lammeree that he could not stay because he had an important appointment to keep. Contrary to Lammeree's instruction, Carter left the plant.

The applicable legal issues have been framed aptly by the Administrative Law Judge. Thus, he found that Carter refused to work overtime contrary to his supervisor's instructions and in violation of Respondent's mandatory overtime rules, and that such insubordinate behavior constituted legitimate grounds for dismissal. Noting that no employee of Respondent had been discharged previously for violation of this rule, the Administrative Law Judge described the issues here as whether Respondent would have meted out the ultimate disciplinary penalty to Carter but for his union activities. Stated another way, he asked whether the discharge penalty constituted discriminatory disparate treatment. We agree with the Administrative Law Judge's finding that legitimate grounds for the discharge of Carter exist here and with his framing of the issue to be decided. We disagree, however, with his assessment of the applicable record evidence and his conclusion.

The Administrative Law Judge found that Respondent has no fixed policy regarding the degree of discipline for violating its mandatory overtime rule or other rules. He reasoned that Respondent was free, therefore, to base the severity of the discipline on its assessment of the seriousness of the misconduct, so long as no considerations unlawful under the Act played a role. He found that Carter's refusal to work overtime represented gross misconduct and insubordination. In so finding, he relied primarily on his findings that it was of critical importance to have forklift truck 16 in operation as

[1] The General Counsel and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

soon as possible, that Carter was made aware of the importance of this work the preceding day, and that he was the only mechanic capable of performing the necessary work. The Administrative Law Judge also found that the General Counsel failed to establish that Carter's discipline constituted disparate treatment.

The General Counsel's evidence of disparate treatment consisted of the testimony of several employees as well as certain "contact reports" subpenaed from Respondent that related to all incidents in which employees had been brought up by their supervisors on charges for refusing to work overtime or similar conduct in the 3 preceding years.

The credited and uncontradicted testimony of employee Gene Praeger is that there had been a number of occasions, including one occasion when two of the large and one of the smaller forklifts were down, when he refused Lammeree's demand to work overtime and had walked off the job without having any disciplinary action taken against him. Each time Praeger had stated that he had a reason, without specifying what it was, for not being able to work overtime.

The credited testimony of John Campbell is that he had been given a 3-day disciplinary suspension for refusing to work overtime in May 1977 after he was instructed by his supervisors to work overtime 10 minutes before the regular quitting time. On a subsequent occasion Campbell was given only a warning when he again refused to work overtime.

The four contact reports (apparently all there were) were submitted by Respondent pursuant to a subpena from the General Counsel. In three instances, an employee who had refused to work overtime and had walked off the job, contrary to his supervisor's instructions, was simply given a warning. The fourth contact report, dated April 20, 1980, involved an employee, Frank Bowerson, who had called his supervisor to request permission not to report for work that day because he wanted to take a trip with his father. Bowerson's request was denied on the ground that there was no one available to replace him, but he stayed out anyway and was given only a 1-day suspension.

The Administrative Law Judge found that Praeger's refusals to work overtime were not comparable to Carter's refusals because Praeger's refusals were always with at least the tacit acquiescence of his supervisor. He distinguished Campbell's discipline from Carter's on the basis that Campbell was given only 10 minutes' advance notice and there were other employees available to do the work. As to the contact reports, the Administrative Law Judge refused to give them any weight because they do not contain all the relevant facts surrounding the various incidents.

The standard used by the Administrative Law Judge to evaluate the evidence of disparate treatment presented by the General Counsel was unduly restrictive. It was not incumbent on the General Counsel to show an identical situation with a diametrically opposite result. Instead, it was the General Counsel's burden to show a pattern of treatment by Respondent of employees who have refused to work overtime that is clearly at odds with the treatment of Carter.

The evidence of disparate treatment presented by the General Counsel must be evaluated within the framework of the undisputed evidence that Respondent has no fixed policy governing the degree of discipline to be imposed for the violation of the mandatory overtime rule. The absence of any such policy is significant because the record evidence shows that employees have violated the mandatory overtime rule on numerous occasions but no employee who has violated the rule had been discharged before Carter. Thus, even before we compare the circumstances present in the refusal to work overtime shown by the General Counsel's evidence with Carter's refusal, it is plain that Respondent has not strictly enforced its mandatory overtime rule and that where it had enforced this rule a warning or lesser discipline has been meted out. It is against this background that the Administrative Law Judge's handling of the individual incidents of refusal to work overtime must be evaluated.

That Praeger's refusals to work overtime were always with at least the tacit acquiescence of his supervisor pales in significance when it is considered that Praeger refused to work overtime on numerous occasions but received no discipline on any occasion. Similarly Campbell did not receive any discipline, but only a warning when he refused to work overtime on a second occasion after his earlier 3-day suspension. Hence, the General Counsel has shown that sometimes, even for repeated violations of the mandatory overtime rule, employees had escaped discipline entirely. This is in stark contrast to Carter's discharge for his first offense of this kind.

Nor do we discount the "contact reports," as the Administrative Law Judge did, because they do not contain all the relevant facts surrounding the various incidents.[2] Indeed, it is significant that

[2] It may be disputed as to who had the burden of filling in the details. Arguably, the General Counsel could have called the employees who were the subject of the reports or the officials of Respondent who prepared the reports to fill in the details. We find, however, that the reports

Continued

these reports were from Respondent's own records. It would be one thing if the General Counsel had predicated his case solely on these records. But these records plainly show three additional instances where an employee has refused to work overtime and walked off the job, contrary to the supervisor's instructions, with no discipline but only a warning. At minimum, they represent additional evidence as to Respondent's past treatment of first offenders. And the contact report on Bowerman shows that his requested permission not to report for work was denied on the ground that no employee was available to replace him. Although the Bowerman incident does not involve the mandatory overtime rule, it does reveal Respondent's reaction to an employee who refused to work when he was denied permission to take off because no employee was available to replace him. Unlike the Administrative Law Judge, we find that these contact reports deserve to be weighed in determining whether Carter's discharge represented discriminatorily motivated disparate treatment and support the General Counsel's contention.

In addition to the foregoing evidence of disparate treatment, it also is plain that the manner in which Respondent arrived at its decision to discharge Carter is inconsistent with its past practice. Thus, there was no prior investigation or effort to ascertain Carter's version of the events even though Carter was initially suspended pending an investigation. Nor did Respondent review Carter's personnel file. It was Respondent's normal procedure, however, to investigate and review an employee's records before meting out discipline.[3] In this connection, Respondent offered no explanation for its failure to follow its normal procedures.

Even if we were to agree with the Administrative Law Judge's resolution of this allegation, we would disagree with his rationale for excusing Respondent's failure to follow its normal procedures or its failure to explain its actions. The Administrative Law Judge excused Respondent's failings "in light of Respondent's grievance procedure which gave Carter the opportunity, which he did not choose to utilize, of presenting his version to Del Gaudio . . . ." This approach effectively punishes Carter for Respondent's failure to follow its own procedures. But that aside, this rationale cannot be accepted here where Respondent insisted not only that Carter leave the Company's property at once but also threatened to call the police if Carter ever set foot on company property again. These statements were made by Respondent, not in the heat of the events on August 1, but at the time Respondent notified Carter on August 4 that he was being discharged.

Aside from the evidence of disparate treatment and failure to follow normal procedures in arriving at the Carter discipline decision, there is other evidence that undermines any finding that Respondent would have discharged Carter in the absence of his union activities. For example, the record shows that Carter was a skilled forklift mechanic with 7 years of satisfactory performance;[4] that Carter not only played a leading role in the Union's organizing campaign,[5] but also served as chairman of the employees' bargaining committee; and that Respondent was overtly hostile to the Union. Finally, it cannot be overlooked that Bianco, who was assigned to maintain forklift truck 16, was available on August 1, did complete the repair work, and had forklift truck 16 in full operating condition within 2 hours.[6]

In sum, we find that the General Counsel has established that Respondent's discharge of Carter constituted discriminatorily motivated disparate treatment and that Respondent failed to show that it would have discharged Carter in the absence of his protected activities. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

CONCLUSIONS OF LAW

1. United States Gypsum Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

contain sufficient facts to demonstrate Respondent's treatment of employees who have violated its mandatory overtime rules. For that reason and because the reports were part of Respondent's own records and are used to formulate a basis for personnel action (see fn. 3, *infra*), we have considered them here.

[3] Two weeks after Carter's discharge, employee Peter Borm was discharged for refusal to work overtime. The record shows not only that Borm had been warned previously that he would be discharged for future attendance problems, but also that Borm was allowed to give his version of the events and his personnel file was reviewed before Del Gaudio made the decision to discharge Borm. This treatment of Borm contrasts starkly with Carter's treatment.

[4] Carter was congratulated by his foreman as the only employee to move from Class C to Class A mechanic within a 2-year period.

[5] That Respondent recognized Carter's role in the organizing campaign is evident from the remarks of Carter's foreman, Tracy, to employee Bianco to the effect that Carter was instrumental in organizing the Union and bringing it into the plant.

[6] Respondent contended that the repair of forklift truck 16 was of critical importance and that Carter was the only employee capable of repairing it. Although Bianco expressed reservations about his ability to perform the work, he did perform the work and the truck was available on the weekend that preceded the decision to discharge Carter. Respondent's further assertion that it had to call an outside contractor to work on forklift truck 16 because of Carter's refusal to work overtime is tempered by Bianco's testimony (ALJD, sec. III,3,1, at fn. 11) as well as record evidence that Respondent used outside mechanics on many occasions.

We mention Bianco's completion of the repair work not for the purpose of excusing Carter's refusal to work overtime but because it is relevant to the circumstances facing Respondent at the time it decided to discharge Carter. In short, the repair of forklift 16 may well have been of critical importance, but it was performed by the employee who Carter insisted could do the work and these circumstances tend to bring this incident closer to those described by Praeger.

2. United Paperworkers International Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union at all times since February 15, 1979, has been, and now is, the exclusive collective-bargaining representative of all employees in the following unit appropriate for purposes of collective bargaining:

> All production and maintenance employees, including quality control department employees and plant clerical employees employed by Respondent at its Baltimore, Maryland, location, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. By refusing since March 1980, to meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the bargaining unit described above, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. By discharging or otherwise discriminating against James E. Carter because of his interest in, or activity on behalf of, the Union, Respondent has violated Section 8(a)(3) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, we shall order it to cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

We shall order Respondent to cease and desist from failing or refusing to bargain concerning rates of pay, wages, hours of employment, and other terms and conditions with the Union as the exclusive representative of the employees in the appropriate unit. Upon request by said Union, we shall order Respondent to meet and bargain with the Union concerning such terms and conditions of employment and, if an agreement is reached, embody such understanding in a written agreement.

We also shall order Respondent to offer immediate and full reinstatement to James E. Carter, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of his unlawful discharge by Respondent. Backpay with interest thereon is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)[7]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, United States Gypsum Company, Baltimore, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to bargain collectively concerning rates of pay, wages, hours of employment, or other terms and conditions of employment, with United Paperworkers International Union, AFL-CIO, CLC, as the exclusive representative of its employees in the following appropriate unit:

> All production and maintenance employees including quality control department employees and plant clerical employees employed by Respondent at its Baltimore, Maryland, location, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Discharging or otherwise discriminating against employees because of their interest in, or activity on behalf of, a labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively with the above-named labor organization as the exclusive bargaining representative of the employees in the above-described bargaining unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a written signed agreement.

(b) Offer James E. Carter immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of his unlawful discharge by Respondent in the manner set forth in the section herein entitled "The Remedy."

---

[7] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Baltimore, Maryland, plant copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

MEMBER ZIMMERMAN, concurring in part and dissenting in part:

For the reasons set forth by the Administrative Law Judge, I would find that the General Counsel has failed to establish that the discharge of employee James E. Carter was discriminatorily motivated. Therefore, I would dismiss the allegation that Carter's discharge violated the Act.

I agree with my colleagues, however, that Respondent violated 8(a)(5) and (1) of the Act by refusing to meet and bargain with the Union after March 18, 1981.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT by failing or refusing to bargain with the United Paperworkers International Union, AFL-CIO, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain through representatives of their own choice, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any and all such activities except to the extent permitted by Section 8(a)(3) of the Act.

WE WILL NOT discharge or otherwise discriminate against employees because of their interest in, or activity on behalf of, a labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act, as amended.

WE WILL bargain collectively, upon request, with United Paperworkers International Union, AFL-CIO, CLC, as the exclusive representative of all our employees in the bargaining unit described below, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees, including quality control department employees and plant clerical employees employed by the Employer at its Baltimore, Maryland, location, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL offer James E. Carter immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings he may have suffered by reason of our unlawful discharge of him, with interest.

UNITED STATES GYPSUM COMPANY

DECISION

STATEMENT OF THE CASE

ARTHUR LEFF, Administrative Law Judge: Upon charges filed by the above-named Union, in Case 5-CA-12049 on March 24, 1980, and in Case 5-CA-12517 on August 14, 1980, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued separate complaints against United States Gypsum Company, herein called Respondent. The two cases have been consolidated for purposes of hearing. The complaint in Case 5-CA-12049 was issued on May 1, 1980. As amended at the hearing, it alleges in

substance that since March 18, 1980, Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act by failing and refusing to meet and bargain with and withdrawing recognition from the Union as the certified majority representative of its employees in an appropriate bargaining unit. The complaint in Case 5-CA-12517, issued on September 18, 1980, alleges in substance that Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily terminating the employment of James E. Carter on or about August 8, 1980, because of his membership in and activities on behalf of the Union. Respondent filed an answer to each of the complaints denying the commission of the alleged unfair labor practices. The hearing in this consolidated proceeding was held before me at Baltimore, Maryland, on October 27 and 29, 1980. Briefs were filed by the General Counsel and by Respondent on December 27, 1980.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Delaware corporation, is engaged in its Baltimore, Maryland, location in the manufacture, sale, and distribution of various products, including gypsum wallboard. During the past year, a representative period, Respondent purchased and received directly from points outside the State of Maryland for use at its Baltimore location products valued in excess of $50,000, and also sold and shipped from that location to customers located outside the State of Maryland products valued in excess of that amount. The complaint alleges, Respondent admits, and it is found that Respondent is engaged in commerce within the meaning of Section 2(5) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Paperworkers International Union, AFL-CIO, CLC, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Respondent's Refusal To Bargain*

1. The relevant facts

On February 15, 1979, the Board, in Case 5-RC-10590, certified the Union as the collective-bargaining representative of Respondent's employees in the following unit found to be appropriate for the purposes of collective bargaining: All production and maintenance employees, including quality control department employees and plant clerical employees employed by Respondent at its Baltimore, Maryland, location, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

Respondent and the Union held their first negotiating meeting on June 15, 1979, and some 17 additional meetings thereafter. Their last meeting was held on January 31, 1980. James A. DelGaudio, the works manager at Respondent's Baltimore location, was Respondent's chief negotiator. John H. O'Brien, an International representative of the Union, was the chief negotiator for the Union. Apparently, very little progress toward reaching an agreement was made by the parties during the 18 bargaining sessions that were held.

On February 12, 1980, 12 days after the last meeting, O'Brien addressed a letter to DelGaudio in which he asked DelGaudio whether he was ready to meet again with the Union and, if so, to let him know on how many days and for how many hours he would be prepared to conduct meetings during the next month. DelGaudio replied by letter, dated February 15, 1980, in which he expressed his willingness to continue negotiations and suggested February 22 as the next meeting date, if convenient to O'Brien. By letter dated February 18, 1980, O'Brien informed DelGaudio that the suggested date was not convenient to him. In his letter, O'Brien further informed DelGaudio that he would be out of the city on a special International union assignment and on vacation from February 26, 1980, through March 16, 1980, and requested that DelGaudio prepare and supply him with a schedule of negotiating dates between March 17, 1980, and April 15, 1980. On February 15, 1980, DelGaudio, in a letter to O'Brien, stated that he had no objection to setting up an advance schedule of multiple meeting dates, but suggested that O'Brien call him when he returned to town so that they might discuss a selection of dates in a more definite manner.

Upon his return to town on March 17, 1980, O'Brien called DelGaudio. DelGaudio was not available that day, but returned O'Brien's call the following morning. There are discrepancies between the respective accounts of O'Brien and DelGaudio as to what was said in their telephone conversation that morning. Based upon my evaluation of the testimony given by each of them and my general impression of their overall credibility as witnesses, I believe, and find, that their conversation was substantially as follows: O'Brien told DelGaudio that he wanted to set up a schedule for further bargaining meetings between Respondent and the Union, and asked DelGaudio to let him know the dates on which he was prepared to meet with the Union and the number of hours that he was willing to allocate to each meeting. DelGaudio replied that he would not at that time stipulate to any further bargaining meeting dates because he wanted first to consult with Respondent's attorneys to obtain their legal advice on the question of whether the Union still occupied a representative status. He told O'Brien that, since writing to him last, he had received comments from employees that they no longer wanted the Union in the plant, and in that connection added, "Furthermore, the employees don't want your big fat ass around here anymore—Even one of your committeemen told me that."[1] O'Brien asked what committeeman had made that remark, but DelGaudio refused to tell him. O'Brien then stated that he intended to get in touch with the Federal Mediation and Conciliation Service so that a mediator could set the meeting dates and assist in the negotiations. DelGaudio rejoined that if that was what O'Brien

[1] The quoted statement is based on credited testimony given by O'Brien that was not specifically disputed by DelGaudio at the hearing.

wanted to do it was all right with him. At that point O'Brien hung up the phone.[2]

Immediately after his March 18 telephone conversation with DelGaudio, O'Brien notified the Federal Mediation and Conciliation Service that the Union and Respondent appeared to have reached an impasse in their negotiations, and requested the appointment of a mediator to help the parties resolve their differences. W. J. Dick was designated by the FMCS to act as the mediator in the dispute.

On March 21, Dick telephoned DelGaudio. He informed DelGaudio that he had already spoken with O'Brien and that he was now touching base with DelGaudio to set up mutually agreeable future bargaining meetings. DelGaudio, according to his testimony, informed Dick that he was not refusing to meet with the Union. But he nevertheless declined to agree to any further meeting dates. He told Dick that he had received comments raising the question of whether the Union still had the support of employees in the plant and that he wanted to discuss that question with Respondent's attorneys and have it resolved before responding to the request for further meetings. Dick left his telephone number with DelGaudio and told DelGaudio to be sure to inform him if he decided to meet with the Union. Later that day, Dick telephoned O'Brien and reported to him that DelGaudio had refused to set any future bargaining dates and the reasons that DelGaudio had given for taking that position.

O'Brien testified that he assumed from what Dick told him, as well as from his telephone conversation with DelGaudio on March 18, that Respondent did not intend to engage in any further bargaining with the Union and, therefore, on March 24, 1980, filed the Union's refusal-to-bargain charge in this proceeding.[3]

DelGaudio had no further communication with O'Brien after their telephone conversation on March 18, nor did he have any with the FMCS mediator. DelGaudio testified that on March 26 or 27, after having received a copy of the Union's refusal-to-bargain charge, he consulted with counsel for Respondent, was advised by counsel that Respondent was still under a continuing obligation to bargain with the Union and, in light of that advice, decided that he would again meet with O'Brien for further contract negotiations. He did not, however, inform O'Brien of that "decision." According to DelGaudio, he did not do so because he expected that O'Brien would call him if O'Brien wanted to set a date for a further meeting. I find it difficult, however, to reconcile DelGaudio's testimony in that respect with his admission elsewhere in his testimony that he inferred from the Union's unfair labor practice charge that O'Brien had concluded that Respondent was refusing to meet with the Union. I am satisfied from all the evidence that DelGaudio did not again communicate with O'Brien because he did not wish to set up further bargaining meetings with the Union.

Respondent introduced into evidence two petitions, one dated April 18, 1980, and the other April 23, 1980, containing the apparent but unauthenticated signatures of 67 employees in the bargaining unit in which the signers of the petitions declared that they no longer wished to be represented by the Union. At that time, according to DelGaudio, there were approximately 105 employees in the bargaining unit. DelGaudio testified that he found the first petition on his desk when he came to work on the morning of April 22, 1980, and the other on his desk the following morning. According to DelGaudio, he had no idea how the petitions were circulated or by whom, nor did he know who had placed them on his desk. As appears from DelGaudio's unchallenged testimony, following the receipt of the aforesaid petitions, Respondent, through counsel, notified the Union that it was withdrawing recognition of the Union as the bargaining representative of its employees.

2. Analysis and concluding findings

The facts found above are sufficient in my opinion to support the complaint's allegation that Respondent has failed and refused since March 18, 1980, to meet and bargain with the Union in violation of its statutory obligation to do so.

It is to be observed, to begin with, that Respondent makes no claim that prior to its receipt on April 22, 1980, of the first of the two employee petitions adverted to above, it had a reasonably grounded good-faith doubt of the Union's continuing majority status that would have justified it in withdrawing recognition from the Union.[4] To the contrary, Respondent concedes that, prior to the date of its receipt of that petition, it was under a statutory obligation to meet and bargain in good faith with the Union.

As shown above, it is undisputed that Respondent never complied with the Union's requests for the setting of further bargaining dates after March 17, 1980, initially made by O'Brien in his February 14 letter to DelGaudio, and repeated by him in his March 18 telephone conversation with DelGaudio. It similarly failed and declined to honor the like request of the FMCS mediator made on March 21, 1980.[5] The fact that DelGaudio in his re-

[2] O'Brien's testimony differs from the findings made above in that he initially testified that DelGaudio stated that he was not going to meet with the Union again. On cross-examination, however, O'Brien acknowledged that DelGaudio may not have made that statement *in haec verba*, but explained that that was the way he interpreted DelGaudio's remarks. DelGaudio's testimony differs from the findings made above principally in this respect: According to his version, their conversation ended with the understanding that O'Brien would also seek legal advice and speak to his "people" about the situation and, after doing so, "we would get back" to DelGaudio. I do not credit DelGaudio's testimony in that respect. There is no reference to any such expressed or implied understanding in a memorandum of his conversation with O'Brien that DelGaudio says he prepared shortly after the conversation occurred. His testimony to the foregoing effect, moreover, is inconsistent with an admission later made by him that it was "never stipulated" in his telephone conversation with O'Brien that O'Brien was to call him again to follow up his (O'Brien's) request for bargaining dates.

[3] The charge alleges, in pertinent part, that since the date of certification, Respondent "refused to bargain in good faith, and as late as 3/21/80 by notification from FMCS to UPIU—continues to refuse to meet and refuses to bargain in good faith."

[4] Cf. *Laystrom Manufacturing Co.*, 151 NLRB 1482, 1483 (1965).

[5] The Board has held that a union's utilization of an FMCS mediator to reinstitute bargaining is sufficient to warrant an 8(a)(5) finding for refusal to meet, even in the absence of a specific request by the union. See *Inter-*

Continued

sponse to these requests did not expressly declare in so many words that Respondent would no longer meet and bargain with the Union does not, of course, preclude a finding of a refusal to bargain. A refusal to meet and bargain, though not expressed, may be inferred from other circumstances. The actions of an employer, or more precisely in this case its inaction, may speak louder than its words. In the instant case, I think that such an inference is clearly warranted from Respondent's subsequent continuing disregard of the requests made of it by the Union and the mediator to set up further meeting dates for the conduct of further negotiations. Respondent's continuing obligation to meet and bargain with the Union was, of course, not affected by the refusal-to-bargain charge that was filed by the Union on March 24. The filing of that charge neither precluded further bargaining nor excused Respondent of its failure to cooperate with the Union in setting up further meeting dates for the continuation of negotiations.

Respondent contends that, when DelGaudio spoke to O'Brien on March 18 and to the mediator on March 21, he was justified, in the light of the comments he had been receiving about antiunion sentiment in the plant, in withholding the scheduling of any further negotiating sessions with the Union until he had an opportunity to obtain legal advice from counsel as to whether, in Respondent's words, "he could in fact, continue to bargain." In view of subsequent events, DelGaudio's good faith in asserting this as his reason for not then complying with O'Brien's and the mediator's request for further meeting dates is open to question. However, assuming *arguendo* that DelGaudio's initially asserted reason for deferring such compliance was a valid and justifiable one, the same cannot be said of his continued failure, after having been advised by counsel on March 26 or 27 of Respondent's continuing obligation to bargain, to notify the Union that Respondent was now ready and willing to stipulate with it on a mutually satisfactory date for the resumption of negotiations. For reasons previously indicated, I am unable to credit DelGaudio's explanation that he refrained from contacting the Union to set up a further bargaining meeting because he expected O'Brien to contact him if he wanted a further bargaining meeting. O'Brien had already made clear to DelGaudio in his February 14 letter and in the March 18 telephone conversation that the Union did want further meetings with Respondent. And the unfair labor practice charge filed by the Union on March 24 made it unmistakably clear that the Union considered Respondent derelict in not having met its earlier request for such meeting dates. For like reasons, I am unable to agree with Respondent's further argument that the burden was on the Union to contact Respondent, rather than the other way around, and that no 8(a)(5) violation may be found in this case because of the absence of evidence of any subsequent union request for bargaining and of a refusal of such a request by Respondent. Here the Union had already made its request for further meeting dates, and Respondent, according to its own position, had simply deferred responding to that request until it had an opportunity to consult with counsel. In these circumstances, I believe it apparent that it was incumbent on Respondent to contact the Union after receiving the legal advice it claimed it needed, and not for the Union to continue to press Respondent for a response to its outstanding request. Respondent's failure to do so unmistakably evidences an unwillingness on its part to meet and bargain with the Union and is supportive of an inference to that effect.

Accordingly, I conclude and find that Respondent, by refusing to meet and bargain with the Union since March 18, 1980, violated Section 8(a)(5) and (1) of the Act.

Absent Respondent's continuing unlawful refusal to bargain, as just found, I would have viewed the employee petitions, which were received by Respondent on April 22 and 23, 1980, and which were apparently signed by a majority of the unit employees, as having provided Respondent with a sufficient basis for doubting the Union's continuing majority status and, therefore, sanctioning its withdrawal of recognition from the Union after its receipt of those petitions. However, I consider Respondent's prior unlawful refusal to bargain on March 18 continuing thereafter without interruption as an unfair labor practice of a sufficiently serious nature to taint the employee petitions and to preclude Respondent from relying upon them as a basis for withdrawing recognition from the Union.[6] Accordingly, and in line with well-established Board precedent in situations of this kind,[7] I find that Respondent violated Section 8(a)(5) and (1) of the Act, not only by its continuing refusal since March 18, 1980, to meet and bargain with the Union, but also by its affirmative withdrawal of recognition of the Union as well.

B. *The Alleged Discriminatory Discharge of James E. Carter*

1. The relevant facts

James E. Carter was employed by Respondent for a period of more than 7 years prior to his discharge on August 4, 1980. He started as a Class C mechanic, advanced to a Class A mechanic in less than 2 years, and during his last 4-1/2 years worked as a mobile mechanic. Respondent does not question his skill as a mechanic. Nor does it make any claim that his overall work record was unsatisfactory. The only reason given by Respondent for his discharge is that he refused on August 1, 1980, to obey a supervisor's order to work overtime on a specific job. Carter was the first employee ever dis-

state Paper Supply Company, Inc., 251 NLRB 1423 (1980). And see also Sec. 204(a)(2) and (3) of the Labor Management Relations Act, 1947. The Supreme Court in *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956), equated the statutory duty under Sec. 204(a)(1) of the Act with the duty to bargain in good faith under Sec. 8(a)(5) and 8(d). The duties under Sec. 204(a)(2) and (3) are similarly equatable with the bargaining obligations of an employer under Secs. 8(a)(5) and 8(d).

[6] Although the parties were apparently still far apart in their negotiations, it cannot be presumed that, even if Respondent after March 18 had bargained in good faith with the Union under the aegis of a mediator, no agreement would have been reached. Nor can it be presumed that if such good-faith bargaining had occurred, even without a contract being reached, a majority of the unit employees would nevertheless have determined to discontinue their support of the Union.

[7] See, e.g., *Guerdon Industries, Inc. Armor Mobile Homes Division*, 218 NLRB 658, 660-661 (1975).

charged by Respondent for refusing to work overtime, although shortly after the filing of the charge in the instant case Respondent did discharge another employee for that reason. The General Counsel does not dispute that Carter refused to work overtime on August 1, but contends that Respondent would not have discharged him for that reason had it not been motivated to do so because of his union activities.

Carter had played a leading role in the organizational campaign that led to the Union's certification on February 15, 1979, as the collective-bargaining representative of Respondent's production and maintenance employees at its Baltimore plant. He served on the Union's organizing committee and was one of the two employees most instrumental in obtaining union designation cards from employees. Following the Union's certification, he served as the chairman of the employees' bargaining committee, and in that capacity participated in all of the 18 bargaining sessions that were held prior to Respondent's unlawful refusal to meet and bargain further with the Union, as found in the preceding section of this Decision. Prior to that time, also, the Union had filed on Carter's behalf two unfair labor practice charges, one alleging a discriminatory 3-day suspension resulting from his attendance at the representation hearing, and the other alleging a discriminatory refusal to promote and transfer him to a more desirable position. Both of these charges, however, were either dismissed or withdrawn. Carter's leadership role in organizing the Union was admittedly well known to Respondent's management. About 6 months prior to Carter's discharge, Fred Tracy, who was Carter's foreman, in a conversation with a new employee (Sam Bianco) about the Union, pointed to Carter who was then leaving the room and remarked, "That's the nigger that got the Union organized, him and a guy named Buck."

As a mobile mechanic, Carter's job function was to service Respondent's forklift trucks and naintain them in a state of repair. At the time material herein, another mobile mechanic, Sam Bianco, who had been with Respondent a relatively short time and was not as skilled as Carter, also performed the same functions. When there was extra work to be done, as was often the case, Respondent would utilize outside mechanics on a contract basis. Respondent had 11 forklift trucks, 6 small ones and 5 large ones. Separate trucks were specifically assigned to Carter and to Bianco for routine servicing, but either of them could be called upon to perform work on a truck assigned to the other when circumstances so required. The large trucks were needed for certain essential plant operations that could not be performed by the smaller trucks. The absolute minimum number of the larger forklift trucks needed for full plant operations was three.

On Thursday, July 31, Respondent was confronted with the following situation with respect to its large forklift trucks. Two of the large trucks, Truck No. 4 (which was routinely serviced by Carter) and Truck No. 16 (which was routinely serviced by Bianco) were nonoperational. Truck No. 4 had been out of commission for some time with serious engine and transmission problems. Truck No. 16 had become inoperable on Tuesday of that week with a burnt-out electric harness. Of the remaining large forklift trucks, one had trouble with its brakes—after an hour or two of service, it had to be shut off to allow the brakes to cool off. The other two trucks that were operational also had defects that made their continued use without breakdown uncertain. Respondent's operations are conducted on a 24-hour-a-day, 7-day-a-week basis, and Respondent was anxious to get one of its big trucks that had been out of use back into operation by the weekend.

On Tuesday, July 29, when the electric harness on Truck No. 16 burned out, Respondent ordered a new harness from a local Hyster dealer, but found when it arrived on Thursday that it was not suitable for that truck. At the instruction of Plant Engineer William Lammeree, Carter attempted to replace the burnt-out electric harness on Truck No. 16 with the harness from Truck No. 4, but found that it could not be used on that truck. Later that day, Lammeree had a telephone conversation with a Hyster parts dealer in York, Pennsylvania, who told Lammeree that he could obtain a suitable harness, but that it would not be available at his shop until 1 p.m. on Friday. Lammeree told the York dealer that he would have one of Respondent's employees pick it up at that time. Carter was present during Lammeree's telephone conversation with the York dealer. Following that conversation, Lammeree told Carter that the harness would arrive at Respondent's plant at or about 2:30 or 3 p.m. on Friday and that Carter should expect to stay on to install it even if it meant working overtime. Carter did not say anything and gave no indication at that time that he would not be able to work overtime on Friday.[8]

On August 1, Carter worked all day without taking a break repairing the engine on Forklift No. 4, and by 3 p.m., his normal quitting time, had successfully completed that job. Truck No. 4, however, was still not in an operable condition because oil had started to leak out of the transmission due to a faulty job that had been performed by an outside contractor. After showing Lammeree the work he had done on Truck No. 4, Carter left the shop to punch out shortly after 3 p.m.

At or about the same time, Sam Bianco, who had been sent to York to pick up the electric harness, returned to the shop. Lammeree approached Carter, who was then in the process of punching out, and told him that the harness had arrived and that he wanted him to install it.

[8] The foregoing findings are based on Lammeree's credited testimony which was corroborated by Wilbur D. Lane, Respondent's service department superintendent, who was also present when Lammeree had his conversation with the York dealer. Carter admitted that he was present during this telephone conversation and that he assisted him in identifying the type of harness that was needed. His testimony was inconsistent, however, concerning as to whether he was told he would be expected to work overtime. Initially, he testified that nothing was said to him on that subject. Later, he admitted that Lammeree did tell him that day before Lammeree made his call to the York dealer that it might be necessary for him to work overtime on Friday, but he testified that this had reference to the completion of his work on the engine of Truck No. 4, the job to which he was assigned on Friday, and had nothing to do with the installation of the harness on Truck No. 16. As the specific subject under consideration at that time involved obtaining a harness for Truck No. 16, and Carter earlier that day had performed related work on that truck, I find Lammeree's version more plausible. Lammaree, by his overall testimony, impressed me as a forthright and careful witness.

Carter told Lammeree that he had already done a full day's work; that he had an appointment he wanted to keep; that Lammeree had another mechanic there who could do the job; and that he should have him install the harness. Lammeree, in an attempt to accommodate Carter, spoke to Bianco about installing the harness, but was told by Bianco that he doubted that he would be able to perform that work correctly, explaining that he had had a similar job assignment once before but had been unable to complete it without Carter's aid. Lammeree then went to the locker room where Carter was in the process of changing his clothes, informed Carter what Bianco had said to him, and told Carter to come back to the shop and meet him at the forklift truck. Carter did come back to the shop. Lammeree again instructed him to stay overtime to install the harness, stating that he was needed for that purpose. Carter inquired whether he would receive report-in pay for punching back in (4 hours' guaranteed pay). Lammeree told him he would not.[9] Carter then again told Lammeree that he could not stay on as he had an important appointment he wanted to keep. Lammeree again instructed Carter to remain and perform the job, but Carter refused and left the plant. According to a written report of the incident, submitted by Lammeree to his supervisor and received in evidence without objection by the General Counsel, Carter, before leaving, complained about the way the Company treated its employees and also stated that he did not care if the Company suspended him for a day or a week for leaving.[10]

After Carter left, Bianco remained in the shop to install the harness. Bianco, who is still in Respondent's employ and who impressed me as an honest witness, testified that he completed his work on the installation of the wiring harness ard had the truck in full operating condition by 5:30 p.m. that day. I credit his testimony.[11]

Immediately following Carter's refusal to work overtime, Lammeree reported his version of the incident to his immediate supervisor, Engineering Superintendent Barry Sharesky, and also to Personnel Superintendent James Booth. The incident was then reported to Workers Manager James DelGaudio, the only person authorized to discharge empoyees. Lammeree recommended that Carter be immediately suspended pending further investigation as to why Carter had refused to stay overtime to work on the truck. His recommendation was approved by DelGaudio. Lammeree telephoned Carter that evening and told him not to come to work the next day (Carter was scheduled to work that Saturday) and not to return to the plant until further notified.

On Monday, August 4, 1980, Carter was summoned to the plant for a meeting with Lammeree and Personnel Superintendent Booth. Booth told Carter that they were making Lammaree his supervisor so that Lammeree could inform him of the decision that had been reached concerning the disciplinary action to be taken against him. Lammeree then informed Carter that he was being terminated for gross misconduct and insubordination in refusing to obey Lammeree's instruction to work overtime on the No. 16 forklift the preceding Friday. Booth then told Carter that Lammeree and the assistant personnel manager would accompany Carter to the shop so that he could get his tools and other personal belongings; that Carter was then to leave the company property at once; and that they would call the police if he ever set foot on company property again.[12]

The decision to discharge Carter was made by DelGaudio. DelGaudio admittedly did not receive any recommendation from anyone below him that he take that action. Lammeree's only recommendation was that Carter be suspended pending investigation. Contrary to the usual practice, no independent investigation was conducted by the department superintendent and no effort was made to obtain Carter's version of the incident before the discharge decision was made. DelGaudio, when asked, was unable to say why the usual procedure was not followed in Carter's case. He did explain, however, that Respondent has a grievance procedure that allows an employee against whom disciplinary action is taken by a foreman to take up and discuss any complaint he may have with the department superintendent and then the works manager. Carter's testimony shows that he was aware of that procedure. His explanation for not requesting a meeting with DelGaudio was that he thought it would be useless, and particularly so since he had been told that the police would be called if he ever set foot on the premises again.[13]

DelGaudio's testimony indicates that in arriving at his decision to discharge Carter, he did not bother to review Carter's personnel record to determine whether Carter had ever been previously disciplined or warned for refusing to work overtime (in point of fact, Carter had not). Nor did he take into account Carter's length of service, competency as an employee, past work record, and other matters that normally would be considered in determining whether discharge action is warranted. When asked what considerations he did take into account, DelGaudio testified as follows:

[9] According to Carter's undenied testimony there had been occasions in the past prior to the advent of the Union when he and other employees were allowed report-in pay when called back to work after they had punched out even though they were not still on plant premises. Under Respondent's then-current policy, however, employees were not entitled to report-in pay if called back to work while still on plant premises. During the negotiations, the Union had sought to have Respondent change its policy in that respect.

[10] The findings in this paragraph are based in the main upon the credited testimony of Lammeree. Carter's testimony does not differ substantially from Lammeree's except in two respects. Lammeree's testimony makes no mention, one way or the other, about Carter stating on Friday that he had an important appointment he wanted to keep. Lammeree also testified that he could not recall Carter saying anything about call-in pay. Carter's testimony with respect to these two items was corroborated by Bianco and is credited.

[11] Respondent asserted at the hearing that because of Carter's failure to work overtime, it became necessary for Respondent to call in an outside mechanic to check and service the truck. According to the documentary evidence introduced by Respondent to support that assertion, the only work done by the outside mechanic was the straightening out of two wires and the replacement of a voltage regulator, a part that Bianco credibly testified he had alreaqy replaced.

[12] Following Carter's discharge, Respondent utilized outside mechanics on a contract basis for a period of aoout 2 to 3 weeks to perform the work that Carter normally would have performed.

[13] Carter's testimony shows that he did thereafter talk to Bianco on the telephone, but did not ask for a meeting with DelGaudio.

> I reviewed the entire incident with Mr. Lammeree, Mr. Lammeree's supervisor and Mr. Booth. I weighed all the facts that were presented to me. The decision to discharge from the facts presented to me were that Mr. Carter was made aware 24 hours ahead of time that he would have to work on this particular job. At that time he gave no indication that he would not be able to work. It was an absolute necessity that that piece of equipment be running and Mr. Carter was the only one who could do the job. Mr. Lammeree, his supervisor, instructed him to do that job and in spite of this, Mr. Carter refused to work the overtime and walked off the job.

DelGaudio testified that in view of Respondent's mandatory overtime policy he considered Carter's refusal to obey Lammeree's instructions in these circumstances to be gross misconduct and insubordination warranting discharge.

The record shows that Respondent has a mandatory overtime policy under which employees may be required to work overtime without their consent when directed to do so by their supervisors. That policy, however, has not been strictly applied. Thus, when an employee is told to work overtime by his supervisor and presents a reason for not being able to do so, the supervisor will normally try to get another employee to perform the overtime work or make some other accommodation to take care of the situation. Prior to the August 1 incident, Carter himself on a number of occasions had requested to be relieved of overtime work because of other things he had to do, and his requests had been granted. Gene Prager, a mechanic presently employed by Respondent, who had serviced forklifts under Lammeree's supervision for about a year until he was transferred to another position, testified without contradiction that there had been a number of occasions, including one occasion when two of the larger and one of the smaller forklifts were down, when he had refused Lammeree's demand to work overtime and had walked off the job, without having had disciplinary action taken against him. His testimony indicates, however, that each time he had stated that he had a reason, without specifying what it was, for not being able to work overtime. He also conceded that he was never faced with a situation where he had walked off the job after his supervisor had instructed him to remain regardless of his reason for not wanting to do so. Concerning his own understanding of Respondent's mandatory overtime policy, Carter testified as follows:

> Q. Mr. Carter, you know you could be disciplined for refusing to work overtime, correct?
>
> A. If on any job, if a person came up, a supervisor came up and told you you had to work over and you just like that say no, and then walk out, sure that's grounds for disciplinary action.

Carter also testified that:

> If you were told to work over, it was considered mandatory if the supervisor told ahead of time.

DelGaudio admitted that he was not personally aware of anyone in the history of the plant who, prior to Carter's discharge, had ever been terminated for refusing to work overtime. In May 1977, one employee, John Campbell, had been given a 3-day disciplinary suspension for refusing to work overtime.[14] So far as this record shows, Campbell was the only employee prior to Carter's discharge against whom any disciplinary action (excluding warnings) had been taken for refusing to obey a supervisor's order to work overtime. The General Counsel subpenaed from Respondent its documentary records (contact reports), covering the 3-year period prior to Carter's discharge relating to all incidents in which employees had been brought up by their supervisors on charges for refusing to work overtime or similar conduct. He introduced into evidence four such contact reports, seemingly all that there were. Three of these contact reports related to incidents that occurred prior to September 1979 when DelGaudio became the works manager. In each of them the employee involved was simply given a warning for having refused to work overtime and walking off the job, contrary to his supervisor's instruction. The fourth contact report, dated April 20, 1980, involved an employee, Frank Bowerson, who had called his supervisor to request permission not to report for work that day because he wanted to take a trip with his father, was denied such permission on the ground that there was no one available to replace him, but stayed out anyway. The employee was given a 1-day suspension.

Following Carter's termination, Respondent did discharge an employee (Peter Born) for refusal to work overtime. That discharge occurred on August 21, 1980, about 10 days after the filing of the unfair labor practice charge in this case. Born was discharged for leaving his job at his regular quitting time because he wanted to pick up his wife at her place of work.[15] Born, it appears from his personnel file, had on a prior occasion been warned that he would be discharged for future attendance problems. His personnel file was reviewed by DelGaudio before he made his discharge decision. DelGaudio admittedly did not even refer to Carter's personnel file. Moreover, Born, prior to his discharge, was contacted by his department superintendent and allowed to give his version of the events, a practice that DelGaudio admitted was normally followed, but was not in Carter's case.

2. Analysis and concluding findings

On the facts of this case, I believe it clear enough that Carter's refusal to work overtime, contrary to his super-

[14] Campbell was called as a witness by the General Counsel. His testimony discloses that he had been instructed by his supervisor to work overtime 10 minutes before his regular quitting time, that he had refused to do so stating that he had to pick up his wife at her job, and that he had rejected the department superintendent's suggestion that he return to work after driving his wife home. On a subsequent occasion when Campbell had again refused to work overtime and had walked out, he was only given a warning.

[15] Born's reason for refusing to work overtime appears to be similar to the one given by John Campbell who, as earlier noted, was given a 3-day suspension and on a subsequent occasion only a warning for again refusing to work overtime. The Campbell incidents occurred before DelGaudio became works manager.

visor's instruction and in violation of Respondent's mandatory overtime rule, constituted insubordinate conduct on his part for which he could have been legitimately disciplined. Prior to Carter's discharge, no employee had been discharged by Respondent for violation of that rule. The question left to be decided, as I see it, boils down to this: Would Respondent have meted out that ultimate disciplinary penalty to Carter but for his union activities? Basically, although perhaps not entirely, it is the General Counsel's position that Respondent's discharge of Carter was violative of Section 8(a)(3) and (1) because it constituted discriminatorily motivated disparate treatment of him. Respondent, on the other hand, argues that the General Counsel has failed to make even a *prima facie* showing to support an inference that Carter's union activities were a motivating factor in its discharge decision; that no adverse inference based on disparate treatment is justified by the evidence in this record; and that, in view of the circumstances involved in Carter's refusal to work overtime, Respondent would have discharged Carter even in the absence of his union activities.

There are undoubtedly circumstances present in this case that may give rise to a suspicion that Carter would not have been discharged but for the prominent role he had played in the Union's organizational and other activities at Respondent's plant prior to Respondent's refusal to bargain. More suspicion, however, is not enough to support an 8(a)(3) allegation. The law requires supporting evidence of a substantial nature. Although my conclusion in this respect may not be free from doubt, I am not convinced that the evidence in this case is sufficiently substantial to support a finding of discriminatorily motivated disparate treatment, or to support an 8(a)(3) violation finding on any other ground.

It is noted, to begin with, that the evidence in this record that might support an inference of antiunion motivation is weak at best. Such an inference may possibly be drawn from Respondent's unlawful refusal to bargain and the derogatory remark made by Foreman Tracy to Bianco about 6 months before Carter's discharge. But whatever force that evidence might otherwise have is largely diminished in this case by other considerations. Thus, there is no indication that Respondent engaged in any independent 8(a)(1) violations since the advent of the Union on Respondent's scene. What is more important, the record reveals nothing of significance in the timing of Carter's discharge. So far as appears from this record, neither the Union nor Carter had engaged in any union activities at Respondent's plant since Respondent's withdrawal of its recognition of the Union, some 5 months before Carter's discharge. And in view of the pendency of the unfair labor practice case based on the 8(a)(5) charge, and the likelihood that it would be fought by Respondent, if it lost, up through the court of appeals, there was little prospect at the time of Carter's discharge of any revival of the Union's activity at Respondent's plant for a considerable time to come. It is also worthy of note in that connection, although alone by no means controlling, that although Respondent was admittedly aware of Carter's prominent role in union activities for 2-1/2 years prior to his discharge, there is nothing in this record to show that any unlawful discriminatory action was taken against him during that period.

As noted above, the major question here is not whether Respondent had a legitimate basis for disciplining Carter for his refusal to work overtime—clearly it had—but whether the discharge penalty meted out to him for that offense constituted discriminatory disparate treatment. Respondent, so far as this record shows, had no fixed policy with regard to the degree of discipline, if any, that was to be imposed on employees for violating its mandatory overtime or other rules. It was free to base the severity of its discipline upon its assessment of the seriousness of the misconduct involved, so long as it did not take into account considerations that were unlawful under the Act.

In the case of Carter, it cannot be said that Respondent had no justifiable reason, at least from its point of view, for regarding Carter's refusal to work overtime on August 1, 1980, as gross misconduct and insubordination. Respondent considered it of critical importance to its operations to have the electric harness installed in forklift Truck No. 16 as soon as possible. Its fleet of large trucks was in bad condition, with two trucks completely down, one operable only part of the time, and the others in danger of breaking down. If Truck No. 16 were not repaired and another truck were to break down it would have resulted in a curtailment of Respondent's weekend operations. Carter, as his own testimony shows, was made aware by Lammeree the preceding day of the importance of having one of the disabled trucks brought into operable condition by Friday afternoon. He was given 24 hours' advance notice that he would be required to work overtime on Friday, August 1. He was also aware, after Bianco expressed uncertainty as to his ability to install the electric harness, that he (Carter) was the only mechanic available at the time to perform the job. Nevertheless, he refused to work overtime and walked off the job, contrary to his supervisor's direct instructions and in violation of Respondent's mandatory overtime rule.

The law is clear that, prior to drawing an adverse inference based on disparate treatment, a basis for comparing the underlying incidents must be established. *Soldier Creek Coal Company, a Division of California Portland Cement Co.*, 243 NLRB 456, 462 (1980). With the aim of establishing disparity of treatment, the General Counsel called two witnesses, John Praeger and John Campbell, and also introduced into evidence four contact reports from Respondent's personnel records covering the 3-year period prior to Carter's discharge. As appears from the findings made above, although Praeger testified that while working as a mobile mechanic under Lammeree he had refused to work overtime on a number of occasions without being disciplined therefore, he admitted that he had never been faced with a situation, such as was true in Carter's case, where he was expressly directed by his supervisor to work overtime regardless of his stated reason for not wanting do so. In short, Praeger's testimony discloses that his refusals were always with at least the tacit acquiescence of his supervisor, and, therefore, not comparable to Carter's refusal here in question.

Campbell's refusal to work overtime, for which he received a 3-day disciplinary suspension, differs from Carter's, in that Campbell was given only 10 minutes' advance notice and there were others available to do the work, as well as for other reasons indicated in the footnote set out above relating to his suspension. The contact reports in evidence, to which reference has been made above, show that prior to the time DelGaudio became works manager three employees were simply warned for refusing to work overtime, two because they did not want to stay beyond their regular quitting time, and one because he had a part-time job to go to.[16] The contact reports in evidence upon which the General Counsel relies to show disparate treatment do not contain all the relevant facts surrounding the various incidents involved such as: whether or not the employee given the warning had received advance notice that he would have to stay over; whether or not others were available to do the overtime work he was instructed to perform; and whether or not the overtime work was considered critical to plant operations. The contact reports in evidence, therefore, do not provide a sufficient basis for comparison with Carter's situation to support a finding that Respondent's discharge of Carter constituted disciminatory disparate treatment. I so find.

In reaching my conclusion that this record does not support an 8(a)(3) finding, I have not ignored the General Counsel's further argument that Respondent's precipitous action in discharging Carter, without any prior investigation or effort to ascertain Carter's version of the events and without so much as reviewing Carter's personnel file, constitutes evidence of pretext. But in the light of Respondent's grievance procedure which gave Carter the opportunity, which he did not choose to utilize, of presenting his version to DelGaudio, I do not think that the absence of a prior investigation and deviation from other normal procedures is enough in this case without proof of disparate treatment to support an inference that Carter's discharge was unlawfully motivated. Were I sitting on this case as an arbitrator, I might well have viewed the discharge discipline meted out to Carter for his refusal to work overtime, his first offense of that kind, as too harsh a penalty, considering his admitted skill as a mechanic and his 7 years of apparently satisfactory service as an employee. But under the applicable evidentiary standards and principles of law by which I am bound, and notwithstanding the circumstances giving rise to suspicion, I am impelled to conclude that on the record made in that case the General Counsel has not met his burden of establishing by a fair preponderance of credible evidence that Respondent would not have discharged Carter for his insubordinate refusal to work overtime, but for his union activities.

Accordingly, I shall recommend dismissal of the complaint's 8(a)(3) and (1) allegations in Case 5-CA-12517.

[16] As noted above, the other contact report, relating to an occurrence after DelGaudio became works manager, did not involve an overtime situation.

CONCLUSIONS OF LAW

1. United States Gypsum Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Paperworkers International Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union at all times since February 15, 1979, has been, and now is, the exclusive collective-bargaining representative of all employees in the following unit appropriate for purposes of collective bargaining:

> All production and maintenance employees, including quality control department employees and plant clerical employees employed by Respondent at its Baltimore, Maryland, location, excluding office clerical employees, professional employees, guards and supervisors as defined by the Act.

4. By refusing since March 18, 1980, to meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the bargaining unit described above, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not, as alleged in the complaint in Case 5-CA-12517, engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices proscribed by Section 8(a)(5) and (1) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom, and from any like or related unfair labor practices, and that it take the affirmative action provided for in the recommended Order below, which I find necessary to effectuate the policies of the Act.

[Recommended Order omitted from publication.]